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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41986[1]

EFFINGHAM RAILROAD COMPANY
--PETITION FOR DECLARATORY ORDER--
CONSTRUCTION AT EFFINGHAM, IL

STB Finance Docket No. 33468

EFFINGHAM RAILROAD COMPANY
--OPERATION EXEMPTION--
LINE OWNED BY AGRACEL CORPORATION

STB Finance Docket No. 33528

EFFINGHAM RAILROAD COMPANY
--OPERATION EXEMPTION--
LINE OWNED BY TOTAL QUALITY WAREHOUSE

Decided: September 17, 1998

In STB Docket No. 41986, by decision served September 12, 1997 (September 12 decision), the Board denied a petition for declaratory order filed by Effingham Railroad Company (ERRC), which sought a determination that the Board does not have jurisdiction over its proposed construction and operation of track serving a new industrial park at Effingham, IL. Joseph C. Szabo, on behalf of United Transportation Union-Illinois Legislative Board (UTU-IL), seeks reconsideration of the September 12 decision.

In STB Finance Docket No. 33468, ERRC filed its initial notice of exemption, on September 15, 1997, under 49 CFR 1150.31, to operate, as a substitute operator for Consolidated Rail Corporation (Conrail), over approximately 206.05 feet[2] of existing railroad track owned by the Agracel Corporation (Agracel) and located in the new industrial park. By decision served

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[1] These proceedings are not consolidated. A single decision is being issued for administrative convenience.

[2] In an attachment to the verified notice of exemption, the length of this line is stated as approximately 206.8 feet, but all other references in these proceedings consistently specify the length as approximately 206.05 feet.

September 24, 1997, UTU-IL's petition to stay the operation of the notice was denied. The initial notice was served and published on October 22, 1997 (62 FR 54897).

In STB Finance Docket No. 33528, ERRC filed its second notice of exemption, on December 3, 1997, to operate over approximately 9,201 feet of railroad line, also located in the new industrial park, to be constructed for and acquired by Total Quality Warehouse (TQW). By decision served December 16, 1997, UTU-IL's petition to stay the operation of this notice was also denied. The second notice was served and published on December 30, 1997 (62 FR 67937).

In both petitions, UTU-IL also sought rejection or revocation of the respective notices. For the reasons discussed below, we are denying the petition to reconsider our denial of the petition for declaratory order and the petitions to reject or revoke both the initial and the second notices of exemption.

BACKGROUND

In its petition for declaratory order, ERRC explained its original approach to providing rail service in the newly developed industrial park near Effingham, IL. ERRC asserted that it proposed to construct and operate certain rail trackage in the industrial park. As "Phase I" of its project, ERRC stated that it had already acquired, from Agracel, approximately 206.05 feet of track, which was part of an existing, 490-foot switch track connected to a Conrail line, that had historically been used as an industrial spur serving a small warehouse located in the area being developed as the new industrial park. In addition, ERRC proposed to construct in the future, as "Phase II" of its project, 9,835 feet of additional track, including 1,867 feet to the north of the existing track (to serve a Ready-Mix plant, characterized as an "existing shipper") and the remainder to the south to reach an interchange connection with the Illinois Central Railroad Company (ICR). Thus, ERRC proposed to establish interchange connections with both Conrail and ICR, without conducting line haul operations of its own. It also had no intention of operating on the tracks of either of those carriers, or operating as a connecting railroad between those two carriers.[3]

However, ERRC's approach to the project of providing rail service in the Effingham industrial park has obviously changed since we denied its petition for a declaratory order. Although our denial of the declaratory order contemplated that ERRC would file either an application or a petition for exemption concerning its project,[4] ERRC has taken a different approach, which was not precluded by the September 12 decision.

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[3] Indeed, the Conrail line to which the initial track segment connects is a line by which Conrail interchanges directly with ICR, and there is no indication whatsoever that these existing interchange arrangements would be affected in any way by any of ERRC's proposals.

[4] See September 12 decision, slip op. at 3.

Under the new approach, rather than acquiring and constructing the track itself, ERRC proposes to be the operator of railroad lines that are owned by or will be constructed presumably by shippers or by the developer of the industrial park. Although the new approach changes the way some of the elements of the project are viewed, it does not require reconsideration of the denial of the petition to institute a declaratory order proceeding, or revocation of the notices of exemption.

In filing the initial notice, ERRC stated that Agracel had acquired 5 acres of real estate from a third party and approximately 206.05 feet of track from Conrail. The notice involved ERRC's operation over this track, which formerly had been a Conrail siding serving a facility located within the area that is being developed as the new industrial park. ERRC described itself as a new carrier substituting for Conrail, operating over the track acquired by Agracel, which extended from an interchange connection with Conrail to the facility purchased by Agracel in the industrial park.

In filing the second notice, ERRC stated that TQW[5] had contracted to acquire approximately 9,201 feet of rail track from a third party contractor that would construct the track within the industrial park. The notice involved ERRC's operation over this track, once TQW had completed its acquisition of the track from the contractor that built it. TQW is said to have used Agracel's transloading facility, located on the initial track segment, but also had decided to construct a new warehouse, located just south of the Agracel facility and the end of the initial track segment, in order to take delivery of rail shipments more efficiently. In this connection, TQW hired an independent contractor to extend the initial track segment an additional 400 feet, to serve its new warehouse. ERRC has agreed to operate this extension under a "sidetrack agreement" and maintains that this operation is statutorily exempt from Board jurisdiction. In addition, because TQW lacks rail access from ICR, TQW decided to construct an additional 9,201-foot track to connect the new warehouse to an interchange connection with ICR.

DISCUSSION AND CONCLUSIONS

The petition for declaratory order involved proposed new railroad construction within the industrial park. Although, under 49 U.S.C. 10906, the Board does not have authority over the construction and operation of spur, industrial, team, switching, or side tracks, we determined that, where the proposed trackage extends into territory not already served by the railroad, and particularly where it extends into territory already served by another rail carrier, the new construction is subject to Board jurisdiction under the principles stated by the Supreme Court in Texas & Pac. Ry. v. Gulf, Etc., Ry., 270 U.S. 266, 278 (1926) (Texas & Pacific).

[5] TQW is a warehousing company with facilities located in the industrial park. ERRC states that it is not affiliated with TQW; although UTU-IL disputes this, we do not find the point to be pertinent.

Although UTU-IL agrees, in general, with this determination insofar as ERRC's own construction of new track is concerned, it disputes and seeks reconsideration of our further comment, in footnote 8 of the September 12 decision:

> While not seeking a declaratory order with regard to the acquisition in Phase I of its proposal, we note that the same rationale applies and that ERRC must obtain our approval or an exemption before operating the 206.05 feet of track that it acquired from Agracel.[6]

Thus, in essence, UTU-IL's position is that, while the new construction is a line of railroad subject to Board jurisdiction, ERRC's acquisition of an existing spur or siding at the site, as contemplated by the initial notice of exemption, is exempt by statute and thus not the proper subject of a class exemption filing. It further argues that the 400-foot extension is a line of railroad, which has already been constructed and which ERRC is already operating without Board approval.

We are not persuaded by the distinction UTU-IL seeks to draw. It is well settled, as noted in our prior decision, that whether a particular track is a railroad line or a switching track turns on the intended use of the track segment. See Nicholson v. ICC, 711 F.2d 364, 367 (D.C. Cir. 1983). In addition, in those cases where a tenant railroad's intended use of a track segment is different from the use made by the railroad owning the track, we have determined that the tenant's use, rather than the character of the trackage itself, is controlling with regard to its own operations, subject to consideration of the purpose and effect of the construction under Texas & Pacific. Chevron U.S.A., Inc.—Lease and Operation Exemption—Richmond Belt Railway, Finance Docket No. 32352 (ICC

[6] UTU-IL also objects on the following grounds: (1) that the second notice is misleading, because ERRC indicated that consummation of the transaction would occur after 14 days, rather than the 7 days permitted by the statute; (2) that the class exemption procedure should not be available for acquisition of a line that has not yet been constructed; and (3) that the Board's ruling on the petition for declaratory order permits the filing only of an application or a petition for exemption. With respect to the first point, the notice period provided by the statute establishes only a minimum standard, and if ERRC voluntarily undertook to delay its consummation of the transaction, there is no adverse effect upon any party. With respect to the second point, there is no useful regulatory purpose to be served by requiring that a newly constructed track lie dormant pending expiration of the notice period applicable to the exemption to operate the line. With respect to the third point, the language in the September 12 decision, to which UTU-IL refers, pertained to ERRC's proposed construction of new track and did not constrain other approaches if, as apparently was the case, ERRC chose, instead, to acquire lines constructed by noncarriers.

served June 12, 1995), appeal dismissed, Brotherhood of Locomotive Engineers v. U. S., 101 F.3d 718 (D.C. Cir. 1996).[7]

In the initial notice, even under its new approach, ERRC became the operator of a line of track connecting Conrail to the site of the industrial park. Conrail clearly had operated this short track segment as an exempt siding or spur. However, because it was ERRC's initial railroad operation, this track segment became ERRC's entire line of railroad and was not, as to ERRC, a siding or spur. This small piece of trackage initiated ERRC's service from a connection or interchange point with Conrail to a shipper's facility within the industrial park. Thus ERRC's becoming the operator was the proper subject of the initial notice of exemption and was not statutorily exempt under section 10906.

Once ERRC had established itself as a carrier, though, its further extension of operations, over track constructed by or on behalf of particular shippers, no longer constituted an extension of its service, because it was entirely within the boundaries of the industrial park. ERRC states that it considered the 400-foot extension to be statutorily exempt, and on the basis of the information before us, we agree, for ERRC was the railroad serving the industrial park, and, at this point, was not extending its operations into the operating territory of any other railroad.

The second notice, however, involved a further extension of operations over trackage that again left the boundaries of the industrial park, to establish an interchange connection with ICR. We view this, again, as the proper subject of a notice of exemption by ERRC, specifically because it constituted an extension of service to an interchange point with another railroad with which it did not already connect.

Accordingly, we conclude that ERRC's notices involving operations over track crossing the boundaries of the industrial park to establish connections with other railroads (Conrail in the initial notice and ICR in the second notice) were proper subjects of notices of exemption; whereas its other operations over new trackage entirely within the boundaries of the industrial park are properly exempt by statute, as siding, spur, or industrial trackage.

We note that there is recent Board precedent for our decision here. In Chicago Rail Link, L.L.C.—Lease and Operation Exemption—Union Pacific Railroad Company, STB Finance Docket No. 33323 (STB served Sept. 2, 1997), we determined that we have jurisdiction over a notice of exemption concerning the lease and operation of railroad lines that had formerly been used as yard tracks, spurs, and sidings, when the tenant carrier intends to use the track to extend its operations to

[7] UTU-IL argues that this approach is not on point, because the cited decision involves trackage rights, rather than construction of a rail line, but it offers no grounds upon which this purported distinction is relevant.

reach new customers.[8] Accordingly, no good cause has been shown to reconsider our denial of the petition for declaratory order (nor any particular aspect of that decision) or to revoke the notices of exemption.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for reconsideration of the prior decision in STB Docket No. 41986 is denied.

2. The petitions to reject or revoke the notices of exemption in STB Finance Docket Nos. 33468 and 33528 are denied.

3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

[8] This decision also states that, contrary to UTU-IL's assertion, the length of the subject track is not significant in making this determination.